

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 20, 2007 Session

PAUL GRAHAM MANNING v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for DeKalb County
No. 98-89 Leon C. Burns, Jr., Judge

No. M2005-02876-CCA-R3-PC - Filed November 13, 2007

Petitioner, Paul Graham Manning, was convicted of first degree pre-meditated murder and felony reckless endangerment. He appeals the trial court's denial of his petition for post-conviction relief. On appeal, Petitioner argues that he is entitled to post-conviction relief because various constitutional rights were violated before, during and after trial, and that he received ineffective assistance of counsel at all stages of the proceedings. After a thorough review of the record, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and J. C. McLIN, J., joined.

Paul Graham Manning, Whiteville, Tennessee, *pro se*; and Marty Crawford, Cookeville, Tennessee, elbow counsel for appellant, Paul Graham Manning.

Robert E. Cooper, Jr., Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; William Gibson, District Attorney General; Ben Fann, Assistant District Attorney General; and William Locke, Assistant District Attorney General for appellee, the State of Tennessee.

OPINION

I. Background

The facts surrounding Petitioner's offenses were summarized by this Court in the direct appeal as follows:

On the night of December 15, 1997, the Defendant and his wife, Jackie Manning, attended a basketball game in which their son, fourteen-year-old Josh Manning, was playing. On their way home, the Defendant stopped at a liquor store and purchased

a fifth of whiskey. According to Josh, the Defendant began drinking the liquor as soon as he returned to the car.

When the family got home, Josh went to his room and eventually to bed. He was awakened later by the sounds of his parents arguing. Josh testified that he heard the Defendant say something about getting a gun. Josh then heard his father go to the closet where he kept his shotgun. Alarmed, Josh got up and went into the living room. He saw his father seated on the couch with the shotgun nearby; his mother was standing at the front door to the house, directly across from the couch. Josh testified that the Defendant was accusing his wife of infidelity and calling her vulgar names. Josh began arguing with the Defendant, telling him to leave his mother alone. Josh told the Defendant that “he thought he was big and bad because he had a gun.” In response to this taunt, the Defendant fired the shotgun over Josh’s head, striking the wall. A pellet from the blast grazed Josh’s cheek. The Defendant then stated, “That proves my point.”

Following the shot Mrs. Manning stated, “I can’t take this anymore” and began to turn to leave the house. According to Josh, the Defendant responded by saying, “If you move another inch, I’ll blow your head off.” As Mrs. Manning continued her attempt to leave the house, the Defendant fired the gun again. Mrs. Manning fled outside, and Josh ran out to check on her. Josh found his mother lying on the ground with a gunshot wound to her torso.

Josh returned to the house to call 911. He found the Defendant in the Defendant’s bedroom gathering more shotgun shells. Josh begged the Defendant not to get any more shells, and the Defendant eventually dropped the ones he already had in his hand. Josh called 911. While Josh was speaking with the dispatcher, the Defendant yanked on the phone wires leading to the wall jack, disconnecting the call.

Josh told the Defendant that he (the Defendant) had shot the victim and that he (Josh) had to call 911. Josh took the gun from the Defendant, and the Defendant went outside. Josh hid the shotgun under his bed and again called 911 on the cordless headset of the phone. Josh told the 911 dispatcher that his father had shot his mother, but he said that the shooting had been accidental. At trial, Josh explained that this report was not true, but that he was afraid to report the shooting as deliberate. He subsequently told investigating officer Billy Miller that the shooting had not been accidental, and he reiterated this at trial.

Josh returned to his mother and found the Defendant with her. Josh testified that he heard the Defendant say, “Oh, my God. What have I done? Help, help; somebody help. I’m sorry; I’m sorry.” Josh testified that he “guess[ed]” his father was drunk that night, and he further testified that the Defendant did not initially realize that he had shot his wife. When Josh found the Defendant with Mrs. Manning, the

Defendant was applying pressure to the gunshot wound and was crying and upset. The Defendant told Josh at that point to call 911.

Officer Miller testified that when he arrived on the scene, the Defendant was crouched over Mrs. Manning, saying "I'm sorry" and "help her." Josh told Officer Miller that the Defendant had shot at him and then shot his mother. Josh showed Officer Miller where he had hidden the gun, and Officer Miller confiscated the weapon, a 12 gauge shotgun. Officer Miller also recovered from the living room three shotgun shells and two empty shell cartridges. He took photographs of the hole in the wall occasioned by the Defendant shooting over Josh's head. Officer Miller testified that the Defendant was "combative and upset" at the scene but did not appear drunk. Officer Miller stated that the Defendant appeared to know what was going on.

After the Defendant was taken into custody, he gave a short statement to Officer Miller. According to Officer Miller, the Defendant told him that he had been asleep that night and "heard a pop. He got up, walked outside and saw his wife, Jackie, laying in the driveway and stayed there with her until somebody came. He didn't know who they was, who it was that responded, and he said at that point in time he did not remember anything else." The Defendant told Officer Miller nothing else about the incident.

Officer Miller performed a gunshot residue test on the Defendant, but this occurred fifteen or sixteen hours after the shooting. TBI forensic scientist James Russell Davis II testified that the test results were "inconclusive," but he explained that the length of time between the gun being fired and the test being performed was "very important." He testified that a long-barreled gun also reduced the chances of the test being positive.

TBI forensic scientist Donald I. Carman testified that the empty shell casings recovered from the scene had been fired from the shotgun recovered from the scene.

Dr. Charles W. Harlan performed the autopsy on the victim and testified that she died as the result of a shotgun wound to her abdomen. Dr. Harlan recovered multiple shotgun pellets from the victim's body. He testified that the distance from the shotgun to the victim at the time of firing was probably four to six feet, more probably six feet.

Cindy Krupp, the 911 dispatcher who took Josh's calls, testified that the first call came in at about 11:55 p.m. on December 15, 1997. She explained that a boy stated that his mother had been shot and they needed an ambulance. During the call, the phone went dead; however, the caller called back "seconds later." Ms. Krupp confirmed that the caller had described the shooting to her as accidental.

Stephanie Lee, the victim's daughter, testified that her mother and the Defendant began living together when she was in the third grade. She stated that there was a lot of arguing, that the Defendant was "very, very, very jealous," and repeatedly accused the victim of cheating on him and lying to him. Ms. Lee testified that it was common for the Defendant to tell the victim, "If you ever leave me, I'll kill you." Ms. Lee explained that she left the couple when she was thirteen or fourteen to go live with her father. She explained that she left to avoid the constant fighting between her mother and the Defendant.

The Defendant testified that he did not know how his wife came to be shot. He explained that he "woke up" beside her on the ground in the driveway. He stated that he "rolled over and put [his] arm around her and when [he] did that [he] felt the wound." He explained that he "held the wound" and that it was "devastating" to him: "the most traumatic moment in [his] whole life." He testified that the last thing he remembered before waking up was setting his drink on the night stand. He explained that, while Josh was making the second 911 call, he "was in a mental state that [he] couldn't hardly keep conscious. It was all [he] could do to keep [his] mind. [He] kept going in and out conscious, like [he] was drugged or something." With respect to Josh's testimony, the Defendant testified, "I don't remember any incident that he's testified to. I don't have any recollection to that whatsoever." On cross-examination the Defendant stated that he "didn't pull the phone jack out" and that Josh was lying about that. He further stated that he "didn't get a gun that night."

The Defendant admitted on cross-examination that he wrote letters to Josh after his arrest that included the following statements:

If they prove that I didn't do it, you'll be the number one suspect.

And they'll come and get you and jail you for first degree murder and put you away for the rest of your life.

I have a lawyer who will come to see you and tell you exactly what to do.

I have not told the cops anything and even haven't told my lawyer all I know.

You may think all is well but I can assure you that you are in for some surprises if you don't listen to me.

I am your dad and I love you, but I won't take a 15 to 25 year sentence for you.

The Defendant denied that he was trying to get his son to admit to the killing, and he testified that he “was trying to get him to keep his mouth shut.” The Defendant maintained his lack of recollection of the events surrounding his wife’s death, but he stated that “I don’t think I shot her at all.” He claimed to have taken a “truth serum test” that indicated that, “if I did shoot my wife, it was probably an accident.” No further evidence of this “test” was proffered. The Defendant also admitted on cross-examination that his statement to Officer Miller had been false.

State v. Paul Graham Manning, No. M2002-00547-CCA-R3-CD, 2003 WL 354510, at *1 -3 (Tenn. Crim. App., at Nashville, Feb. 14, 2003), *perm. to app. denied* (Tenn. Dec. 15, 2003).

II. Post-Conviction Hearing

Petitioner proceeded *pro se* at the post-conviction hearing but was appointed counsel to assist him if necessary. We observe initially that all of Petitioner’s post-conviction claims stem essentially from his unwavering conviction that his wife, the victim in this case, is not dead. To that end, Petitioner contends that all actions taken by the trial court, the prosecution, the defense team, and the post-conviction court which contradict the existence of this fact violated Petitioner’s constitutional rights to a fair trial and his ability to present a defense, and denied him the effective assistance of counsel at all stages of the proceedings. In addition, Petitioner alleges that all parties involved in the court proceedings or the investigation of his case conspired to “convict an innocent man.”

Petitioner strenuously argues that the victim was only “grazed” by the pellets from his shotgun and she was dismissed from Erlanger Hospital four days after the shooting. Petitioner thus submits that all testimony and documentary exhibits to the contrary were either fabricated or false, that the certified copy of the victim’s death had been altered, and that the autopsy photographs had been “rigged.” Petitioner maintains that a man named Ricky Green shot his wife. Petitioner believes his wife has been placed in the federal witness protection program and is living in Chattanooga.

Prior to the post-conviction hearing, a subpoena was issued for Mr. Green, but Mr. Green could not be located. Petitioner acknowledged that he could not contact the victim to testify on his behalf at the post-conviction hearing, but he attributed this to the constrictions placed on him by his confinement.

Joshua Manning, Petitioner’s son, testified at the post-conviction hearing that he was present at the scene on the night of the shooting. Mr. Manning was grazed by a shotgun pellet when Petitioner fired the gun at him. Mr. Manning saw Petitioner shoot and kill his mother.

Petitioner’s trial counsel testified that he represented Petitioner from 1997 until 2001. Trial counsel conducted a thorough investigation and reviewed all of the evidence with Petitioner prior to trial. Trial counsel created a synopsis, or “cheat sheet,” of the evidence because Petitioner was concerned about several “minor inconsistencies” in the evidence, particularly the victim’s medical

records, and wanted those inconsistencies highlighted at trial. Trial counsel stated that Petitioner insisted that trial counsel stipulate to the introduction of the hospital records as an exhibit at trial because Petitioner wanted to expose the “lies” in the records as support for his conspiracy theory.

Trial counsel said that he spent a minimum of 150 hours reviewing the case with Petitioner and met with Petitioner seven of the ten days preceding the trial. In the five days immediately prior to trial, counsel met with Petitioner a minimum of five hours each day. The last three days preceding trial, he spent eight hours each day with Petitioner.

Trial counsel said that Petitioner insisted on undergoing a “truth serum” test despite counsel advising against the test. According to counsel, nothing was revealed through the test because “it was just gibberish.” Trial counsel also advised against Petitioner requesting that the contents of the glass Petitioner was drinking from on the night of the incident be tested for drugs. Trial counsel said that he explained to Petitioner that any negative results would only help the State’s case. Nonetheless, Petitioner demanded that the contents of the glass be tested because he believed someone had drugged him prior to the shooting. The results of the test were negative for any drugs.

Trial counsel stated that he advised Petitioner that he should present a defense based on an accidental shooting to establish that Petitioner was at most guilty of reckless homicide. He also suggested a defense of diminished capacity. Petitioner refused to accept trial counsel’s suggested defenses. Petitioner insisted that he was drugged, not drunk, at the time of the shooting, that his wife was not dead, and that there was no way the events could have occurred in the manner described by the police and medical attendants. Trial counsel said that Petitioner “kept telling [trial counsel] that [Petitioner] would let [him] know what the defense [was] going to be when [he] took the stand, and that certain things would happen, materialize during the trial.” As a result, trial counsel was forced to prepare three different trial strategies and three different opening statements. Trial counsel stated that he believed that if Petitioner had authorized him to present a defense based on an accidental shooting, there was a good chance that Petitioner would have been convicted of a lesser offense.

Trial counsel felt the 911 tape, which was introduced as an exhibit at trial, was beneficial to Petitioner’s case because Petitioner’s son initially told the dispatcher that the shooting was an accident. Trial counsel cross-examined Josh Manning extensively at trial but made a tactical decision not to push any harder when Josh became emotional. Trial counsel felt that he thoroughly cross-examined Cindy Knopp regarding the 911 calls and brought out the points that were beneficial to Petitioner’s defense. This specifically included the portions of the call in which Petitioner’s son stated that the shooting was an accident. He did not feel the need to cross-examine Ms. Knopp about the second 911 phone call because it was not beneficial to Petitioner’s defense.

Trial counsel felt he adequately cross-examined all of the witnesses and made every effort to highlight any evidentiary discrepancies. Trial counsel said that the State explored the discrepancies in the medical records during the presentation of its case-in-chief. Trial counsel said that once the victim’s death had been established, he believed that it would not be effective to continue to probe into the minor inconsistencies in the medical records. Trial counsel stated that

before concluding his cross-examination of each witness, trial counsel consulted with Petitioner to make sure Petitioner did not want him to ask any other questions or cover any other points.

On cross-examination, trial counsel testified that Petitioner was found incompetent to stand trial for a period of time and was medicated and confined to a treatment facility. Trial counsel then identified the autopsy photographs of the victim depicting a gunshot wound in the victim's side, and the photograph of the victim in her casket at the funeral home.

Trial counsel acknowledged that he followed up on several of Petitioner's leads, most of which proved to be "wild goose chases." Petitioner's claims were so "outrageous," that the defense team felt that they had to investigate every lead Petitioner suggested. Trial counsel tried to locate Ricky Green but was unsuccessful. Trial counsel also unsuccessfully tried to ascertain if the victim was alive and participating in the federal witness protection program. The investigation revealed no evidence that Petitioner's wife was still alive or that there was a conspiracy to convict Petitioner of her murder.

Trial counsel said that he pleaded with Petitioner to accept the State's offer to settle the charges with a recommended sentence of eighteen years in exchange for Petitioner's entry of a plea of guilty to second degree murder. Petitioner, however, refused to accept any plea offer that included a sentence of anything other than time served.

Cynthia Knopp, the dispatcher who received the 911 call from Petitioner's son, testified that she could not recall whether there were two 911 calls following the shooting. She likewise did not recall hearing a female voice in the background of the 911 call.

Petitioner's appellate counsel testified that he was assigned to Petitioner's case after trial counsel left his employment with the public defender's office. Appellate counsel testified that it took approximately eleven months to review and prepare an amended motion for new trial because he needed time to acquire the trial transcripts, familiarize himself with the case, and prepare an appellate brief supported by legal argument. Appellate counsel said that he did not raise a conspiracy issue in the motion for new trial or on appeal because there was no evidence to support Petitioner's conspiracy claim. Both in the motion for new trial and on appeal, appellate counsel argued that the trial court's denial of Petitioner's request to subpoena witnesses to testify at trial violated Petitioner's constitutional right to present a defense. Appellate counsel said he raised each issue that he felt was justified by the record and supportable by legal argument.

Deputy Billy Miller worked for the Dekalb County Sheriff's Department at the time of the shooting. Deputy Miller arrived at the scene to investigate the shooting between 11:57 p.m. and 12:17 a.m. Deputy Miller attempted to question Petitioner regarding the shooting, but Petitioner refused to answer any questions. Petitioner was arrested after the officers determined, based on the available information, that Petitioner was the primary aggressor in the domestic dispute.

Deputy Shawn Puckett also responded to the scene following the shooting. When he arrived at the scene, the victim was laying in the front yard with a gunshot wound in her right side. Petitioner was sitting beside the victim. Deputy Puckett saw a glass of liquor on a table when he entered the house. He did not remove the glass from the table and did not know what happened to the glass after he saw it. Deputy Puckett secured the shotgun Petitioner used to shoot his wife and threaten his son. He saw a shotgun hole in the wall but he failed to note this observation in his police report. Deputy Puckett rode with the victim in the ambulance to the life flight helicopter landing site. The victim was unable to discuss the shooting during the ride. The victim's intestines were protruding from the wound, but Deputy Puckett did not recall "a lot" of blood. The wound was in the victim's abdomen and was "very serious," not just a "graze."

David Brady testified that he supervised trial counsel in his capacity as District Public Defender. On one occasion, Mr. Brady met with trial counsel and Petitioner to discuss trial strategy. Mr. Brady experienced doubts as to Petitioner's competency during this meeting and recommended that Petitioner undergo another psychological evaluation prior to trial. The evaluation concluded that Petitioner was not competent to stand trial, and Petitioner was judicially committed to a treatment facility until such time as he was deemed competent to stand trial. On cross-examination, Mr. Brady testified that he fulfilled his obligations as an attorney with respect to Petitioner's representation, as did everyone under his supervision.

Petitioner testified that he did not shoot his wife and that his wife was not dead. He said that his wife and son drugged him on the night of the incident and as a result, he did not remember anything that occurred during the shooting. He recalled only that he "woke up" in the driveway of his home with his wife beside him. Petitioner put his arm around his wife and felt a "graze" from a bullet on her right side and saw her bowel showing through the wound. Petitioner kept his hand on the wound until the paramedics arrived. Petitioner said that he was then "kidnapped" from his home and charged with his wife's murder.

Petitioner did not believe that his sister-in-law had a certified death certificate for the victim. He said that he wanted the doctor who "worked on [his] wife" to testify as to whether he signed the death certificate, but "the whole thing ha[d] been hidden." Petitioner submitted four different motions to exhume the victim's body and conduct a DNA test to prove that his wife was not dead. Petitioner said that counsel was ineffective and refused to give him hospital records, police reports, or any recorded statements from witnesses. Petitioner said that during trial preparation, he essentially had to do "everything" himself without the aid of counsel.

On cross-examination, Petitioner admitted that his initial statement to police was different from his testimony at trial. Petitioner explained that his stories were inconsistent because he was still suffering from the drugs he had been given. He conceded that seven of the witnesses he subpoenaed testified as witnesses for the State at trial. He said that he was threatened by someone in prison who told him to "cooperate" or his wife and son would be killed.

Petitioner reiterated that he did not shoot his wife. He said that Ricky Green was the actual shooter, and someone arranged for Mr. Green to shoot his wife. Petitioner conceded that he did not see Mr. Green at his home at the time of the shooting, nor did he see him shoot his wife. Petitioner said that Mr. Green's presence "was revealed to him by a source." Petitioner maintained that that the transcript of his trial testimony, the transcript of Ms. Knopp's testimony, and the medical records pertaining to the victim's treatment and death had been fabricated.

At the conclusion of the evidentiary hearing, the post-conviction court found that Petitioner's claims for post-conviction relief had either been previously determined on direct appeal, were not grounds for relief in a post-conviction proceeding, or failed to establish that his counsel's performance was ineffective.

II. Post-Conviction Standard of Review

To sustain a petition for post-conviction relief, a defendant must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. *See* T.C.A. § 40-30-110(f); *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999). During our review of the issue raised, we will afford the post-conviction court's findings of fact the weight of a jury verdict, and this Court is bound by the trial court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). All questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *See Momon*, 18 S.W.3d at 156; *Henley*, 960 S.W.2d at 578-79. However, the post-conviction court's conclusions of law are reviewed under a purely *de novo* standard with no presumption of correctness. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing (a) that the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In order to demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley*, 960 S.W.2d at 580.

As noted above, this Court will afford the post-conviction court's factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates

against the court's findings. *See id.* at 578. However, our supreme court has "determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact ...; thus, [appellate] review of [these issues] is de novo" with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This Court may not second-guess a reasonably based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

III. Issues not Cognizable in a Post-Conviction Proceeding

The issues which may be raised on post-conviction are clearly defined by the Post-Conviction Procedure Act. Post-conviction relief is available only when the petitioner's conviction or sentence is void or voidable because of the abridgement of a constitutional right. T.C.A. § 40-30-103. However, issues, even those with constitutional ramifications, are waived if available at trial and not presented on appeal. *Id.* § 40-30-106(g) (stating that a ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented). In addition, issues which were raised and disposed of on appeal may not be raised again in a post-conviction proceeding. *Id.* § 40-30-106(h).

Petitioner raises several issues which are not cognizable in a post-conviction proceeding. These include allegations that he was denied a speedy trial, that his arrest and subsequent search of his residence were illegal, that his bail was excessive, and that he was wrongfully declared incompetent prior to trial and injected with medications which he deems to be cruel and unusual punishment. In addition, Petitioner's general allegations that all of the witnesses' testimony was either false or fabricated is an attempt to challenge the credibility of the witnesses and the sufficiency of the convicting evidence which was addressed by this Court on direct appeal from the conviction.

In his direct appeal, Petitioner challenged the sufficiency of the convicting evidence, the trial court's jury instructions on lesser included offenses, the trial court's instructions to the jury on the culpable mental state required for premeditated murder, the denial of his constitutional right to a speedy trial, the trial court's denial of his request to reduce his bond, and the trial court's quashing of Petitioner's subpoenas for certain witnesses. Thus, Petitioner's issues concerning any speedy trial violations, the amount of his bail, and the sufficiency of the evidence, including the victim's death, have been previously determined. Issues as to his arrest and the search of his residence, as well as those pertaining to Petitioner's pre-trial competency hearings, were available for challenge on appeal but not presented. Moreover, Petitioner has failed to show that his arrest, the search, or his judicial

hospitalization for a period of time prior to trial rendered his conviction or sentence void or voidable. Accordingly Petitioner is not entitled to relief on these issues.

IV. Full and Fair Hearing

Petitioner argues that he was denied a full and fair post-conviction hearing primarily because the trial court denied his request to subpoena certain witnesses to testify on his behalf at the evidentiary hearing. Petitioner insists that his right to subpoena witnesses is “a guaranteed mandatory right, and the court has no discretion as to choosing who the petitioner can or cannot subpoena to testify on behalf of the petitioner.” Petitioner contends that his limitation on presenting a defense was “the prevalent issue in the entire case.”

Prior to the evidentiary hearing, Petitioner filed a request for the issuance of subpoenas to over fifty potential witnesses including fifteen members of the Erlanger Hospital staff and air medical emergency team, the district attorney’s staff, various physicians involved in Petitioner’s psychiatric treatment, and the trial judge. The State filed a motion to quash the subpoenas for all but twenty-two of the witnesses. The trial court entered an order requesting Petitioner to file an affidavit stating the substance of the proposed testimony for each witness. Petitioner’s affidavit filed in response to the trial court’s order states that the expected testimony of the requested witnesses will be “as to the (actual, factual, life or death) of (Jackie Smart Manning), who is the wife of the accused, and the factual circumstances of the actions taken or not taken, by all individuals who were supposedly involved in the actual and factual life or death, and the resulting consequences of each individual’s participation.” Petitioner had sought to subpoena many of these same witnesses at trial, but the trial court granted the State’s motion to quash the subpoenas.

The trial court conducted a lengthy hearing concerning the proposed testimony of each of the witnesses Petitioner wished to subpoena to testify at the evidentiary hearing. The trial court informed Petitioner at the commencement of the motion hearing that he could call a witness to support a claim that trial counsel’s performance was deficient either in his cross-examination of the witness or for failing to call the witness to testify at trial, or if the witness’s testimony was relevant to Petitioner’s allegation of a conspiracy.

Petitioner’s purpose in calling the requested witnesses alternated from giving the witness a chance “to clear” his or her name after presenting “perjured” testimony, to verifying “under oath” the accuracy of the information contained in various medical reports generated during the victim’s medical treatment prior to death. He suggested that other witnesses would testify that he and the victim were amicable before her death, and he wanted the opportunity to question his psychiatrists as to the reason why he was given psychotropic drugs while involuntarily committed. The trial court concluded that any witness whose proposed testimony was relevant to Petitioner’s ineffectiveness of counsel and conspiracy claims would be subpoenaed to testify. The post-conviction court granted the State’s motion to quash the remaining witnesses whom Petitioner wished to call to testify on matters not related to his post-conviction claims.

Underlying Petitioner's claim that he was denied a full and fair post-conviction hearing because of the trial court's partial grant of the State's motion to quash is his belief that the issue of the victim's death has not been previously determined. Citing Tennessee Supreme Court Rule 28(2)(E), Petitioner asserts that "[a] claim for relief is previously determined only if a court of competent jurisdiction has ruled on the merits of the claim after a full and fair hearing at which petitioner is afforded the opportunity to call witnesses and present evidence." Tenn. R. S. Ct. 28(2)(E). Petitioner asserts that in this case, the issue was not previously determined at the trial level because the trial court "illegally quashed" his subpoenas for certain "material witnesses," thereby denying his right to a full and fair trial. Because he did not have what he considers a fair trial, Petitioner contends that he is not precluded from raising issues other than those cognizable in a post-conviction proceeding during the evidentiary hearing.

It is well established in Tennessee that post-conviction proceedings may not be employed to raise and relitigate or review questions decided and disposed of in a direct appeal. *Searles v. State*, 582 S.W.2d 391, 392-93 (Tenn. Crim. App. 1979). At trial, Petitioner sought to subpoena various medical personnel who had some role in generating the medical records concerning the victim's medical treatment and subsequent death. Petitioner argued that the witnesses were necessary to explain discrepancies in the medical records such as the differences in the operating room numbers and a discrepancy in the time of the victim's death. *Manning*, 2003 WL 354510, at *10. Petitioner contended that the denial of his ability to call these witnesses to testify at trial denied him of the right to present a defense based on the fact "that his wife was not dead."

This issue was addressed in Petitioner's direct appeal as follows:

We acknowledge, of course, that defendants to criminal prosecution have the right under both our federal and state constitutions to compulsory process for obtaining witnesses in their favor. *See* U.S. Const. amend. VI; Tenn. Const. art. I, § 9. This right is further codified in our criminal code. *See* T.C.A. § 40-17-105. The right, however, is not absolute. As previously recognized by this Court, "the constitutional right to compulsory process requires such process for, and only for, competent, material, and resident witnesses whose expected testimony will be admissible." *State v. Smith*, 639 S.W.2d 677, 680 (Tenn. Crim. App. 1982) (quoting *Bacon v. State*, 215 Tenn. 268, 385 S.W.2d 107, 109 (1964)). Thus, trial courts have "the power and the duty to prevent abuse of [their] process by abating subpoenas for witnesses whose testimony would be immaterial." *State v. Womack*, 591 S.W.2d 437, 443 (Tenn. App. 1979). In reviewing a trial court's exercise of its power and duty to prevent abuse of its process, this Court applies an abuse of discretion standard. *See State v. Connie Easterly*, No. M2000-00077-CCA-R10-CO, 2001 WL 208514, at *7 (Tenn. Crim. App., at Nashville, Mar. 1, 2001). The Defendant has failed to demonstrate that the trial court abused its discretion in quashing his subpoena for the attendance of numerous medical personnel. The victim's daughter testified that she saw the victim's body, made the funeral arrangements, and attended the funeral. A certified copy of the victim's death certificate was admitted at trial.

There was no proffer of proof at trial that any of the witnesses attempted to be subpoenaed by the Defendant would have cast any doubt on the victim's death. In short, the Defendant has failed to demonstrate that any of these witnesses would have offered material evidence and has failed to demonstrate that the trial court thereby abused its discretion in quashing his subpoena. Accordingly, this issue is without merit.

Manning, 2003 WL 354510, at *11.

The fact that Petitioner vehemently disagrees with this Court's decision on this issue does not negate the fact that the issue has been previously determined. Moreover, to the extent that Petitioner is attempting to relitigate the issue of the victim's death or the trial court's grant of the State's motion to quash, this Court has previously ruled on the merits, and the Supreme Court denied further review. Thus, the issue is not presentable in a post-conviction forum. T.C.A. § 40-30-106(h).

Turning to the post-conviction court's denial of his right to subpoena witnesses for the evidentiary hearing, we reiterate, contrary to Petitioner's assertions, that a petitioner's right to compulsory process for obtaining witnesses in his or her favor is not absolute. *Smith*, 639 S.W.2d at 680. Grounds for post-conviction relief are limited to constitutional abridgements that result in a void or voidable conviction or sentence. T.C.A. § 40-30-103. The post-conviction hearing was limited to the issues of ineffective assistance of trial and appellate counsel and Petitioner's allegations of a conspiracy. The post-conviction court found that Petitioner had failed to establish that the witnesses in questions were material to these specific issues. Accordingly, we find no abuse of discretion in the trial court's granting of the State's motion to quash the subpoenas at issue.

Petitioner lists several other procedural defects which he contends denied him a full and fair post-conviction hearing such as the inadequacy and untimeliness of the State's response to his petition for post-conviction relief, and the delay between the filing of the petition and the evidentiary hearing.

The Post Conviction Procedure Act provides in relevant part that the court to whom the post-conviction case is assigned shall, upon examination of all records and documents pertinent to the case, dismiss the case or enter a preliminary order designating further consideration of the case within thirty days of the date of the original filing or of an amended petition. T.C.A. § 40-30-106. Also, the State, upon receiving the petition from the court clerk, shall file an answer within thirty days, unless extended for good cause. *Id.* § 40-30-108. However, failure by the State to timely respond does not entitle the petitioner to relief under the Post-Conviction Procedure Act. *Id.* The court shall review the case after the State's response is filed. *Id.* § 40-30-109. If the petition is not dismissed, the judge shall enter an order within thirty days after the filing of the State's response setting an evidentiary hearing. *Id.* The evidentiary hearing shall be within four calendar months of the entry of the court's order. *Id.* Such deadline may be extended only by order of the court based upon a finding that unforeseeable circumstances render a continuance a manifest necessity. Such

extension shall not exceed sixty days. *Id.* Upon the conclusion of the proof, the court shall rule within sixty days. *Id.* § 40-30-111(d). Such deadline may be extended only by order of the court based upon a finding that unforeseeable circumstances render a continuance a manifest necessity. *Id.* Such extension shall not exceed thirty days. *Id.*

The record reflects that Petitioner filed his petition for post-conviction relief on January 2, 2004, and the evidentiary hearing was held on October 14, 2005. We also note, however, that the trial court conducted numerous hearings on Petitioner's various pre-hearing motions, and hearings on the status of the case were conducted on March 4, 2005, and July 14, 2005. Regardless, this Court has previously held that the post-conviction court's noncompliance with the time strictures of the Post-Conviction Procedure Act does not entitle the petitioner to post-conviction relief. We have stated that nothing in the Post-Conviction Procedure Act prescribes either a remedy or a sanction for a post-conviction court's failure to comply with the time limits set out in the Act. *See Kelvin Wade Cloyd v. State*, No. E2003-00125-CCA-R3-PC, 2003 WL 22477866, at *17 (Tenn. Crim. App., at Knoxville, Nov. 3, 2003), *perm. to appeal denied* (Tenn. Jan. 26, 2004); *Johnny O. Clark v. State*, No. W2001-02856-CCA-R3-PC, 2002 WL 1841630, at *10 (Tenn. Crim. App., at Jackson, Aug. 8, 2002), *perm. to appeal denied* (Tenn. Dec. 23, 2002). Moreover, Petitioner has not shown any prejudice resulting from such delays.

Due process in the post-conviction setting requires that the petitioner have “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Stokes v. State*, 146 S.W.3d 56, 61 (Tenn. 2004) (quoting *House v. State*, 911 S.W.2d 705, 711 (Tenn. 1995)). In the case *sub judice*, Petitioner was given great leeway during the post-conviction hearing with regard to the admission of evidence, witness testimony, and offers of proof. Petitioner was given the opportunity to explore his post-conviction issues and was allowed to call and question both his trial counsel and his appellate counsel. After our review of the record, we conclude that Petitioner was provided a full and fair hearing on his claims for post-conviction relief as required by law.

In a related issue, Petitioner contends that he was denied a full and fair post-conviction hearing because his appointed post-conviction counsel did nothing to secure and protect his rights. We observe that on February 3, 2004, the post-conviction court appointed counsel to assist Petitioner in his post-conviction proceeding and ordered counsel, after consultation with Petitioner, to file an amended petition for post-conviction relief if necessary. On July 4, 2004, Petitioner filed a “Notice that Petition will not be Amended,” stating that his petition for post-conviction relief was “full and complete.” According to his notice, Petitioner also filed a motion to proceed *pro se* which was subsequently granted in part by the post-conviction court. In its order, the post-conviction court requested Petitioner's court appointed counsel to continue to represent counsel as “elbow counsel.”

There is no constitutional right to representation by counsel in post-conviction proceedings and, thus, no right to effective assistance of counsel in post-conviction proceedings. *Leslie v. State*, 36 S.W.3d 34, 38 (Tenn. 1999) (citing *House v. State*, 911 S.W.2d 705, 712 (Tenn. 1995)). However, there is a statutory right to counsel. *See* T.C.A. § 40-30-107(b)(1). “The appointment of counsel assists in ensuring that a petitioner asserts all available grounds for relief and fully and fairly litigates

these grounds in a single post-conviction proceeding.” *Leslie*, 36 S.W.3d at 38. The record reveals, however, that Petitioner wished to represent himself at the post-conviction proceeding and the post-conviction counsel appointed by the trial court apparently played only a limited role at Petitioner’s insistence.

At the hearing on Petitioner’s motion to proceed *pro se*, Petitioner stated that the delay in the proceedings was not his only reason for wishing to represent himself. Petitioner informed the trial court that he was “the only one that really [he could] look to and trust to defend [his] case.” The post-conviction court explained the value of counsel’s assistance and Petitioner responded, “If you absolutely insist that I have an attorney, then I absolutely insist that that attorney obey my wishes.” The post-conviction court found that Petitioner had knowingly and voluntarily made his decision to proceed *pro se* but required appointed counsel to remain on as elbow counsel. The post-conviction court informed Petitioner that appointed counsel’s assistance would be limited to answering any questions Petitioner might have and advising him of potential steps to take. The post-conviction court assured Petitioner that appointed counsel would not tell Petitioner “what to do.”

Petitioner now apparently wants to argue that his appointed counsel’s limited assistance denied him a full and fair hearing. Petitioner alleges that appointed counsel advised him that only one issue had a chance to succeed thereby proving “that she never intended to provide effective assistance of counsel.” Petitioner contends that he “was forced and compelled into presenting his *pro se* case . . . to alleviate further delays to his eventual vindication.” Petitioner, however, clearly expressed his desire to proceed *pro se*, and he accepted the assistance of appointed counsel only if he was allowed to argue his case and represent himself throughout the proceedings. We will not remand for a new hearing on this ground.

IV. Brady Violation

Petitioner contends that the State knowingly withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963). It appears that an “evidence tag” prepared by a member of the hospital staff listed the evidence retrieved from the victim’s body as “a bullet” and “a shot-gun wadding” instead of pellets. It also appears that the evidence tag was provided to defense counsel prior to trial. Petitioner argues that the fact that the evidence tag was only produced after he filed a Motion to Compel Discovery supports a finding that the State’s previous “concealment” of the evidence before he filed his motion constituted a *Brady* violation.

To prove a *Brady* violation, a defendant must demonstrate that 1) he requested the information (unless the evidence is obviously exculpatory, in which case the state is bound to release the information whether requested or not); 2) that the state suppressed the information; 3) that the information was favorable to the defendant; and 4) that the information was material. *Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001). The evidence is deemed material if “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed.

2d 481 (1985). Even assuming *arguendo* that the State had an obligation to disclose the piece of evidence without a request to do so in the form of a Motion to Compel Discovery, the end result is that the State did not suppress the evidence, and thus we find no *Brady* violation.

V. Recusal of Trial Judge and District Attorney's Office/Conspiracy

Petitioner argues that the post-conviction court erred in denying his Motion for Recusal of the post-conviction judge who had also presided over his trial. Petitioner argues that the post-conviction judge had joined the prosecution's and defense team's conspiracy at trial to "convict an innocent man." Commingled with this issue is Petitioner's contention that the alleged conspiracy denied him his due process right to a fair trial.

At the evidentiary hearing, Petitioner offered no evidence in support of his allegation of a conspiracy other than his repeated insistence that the presence of a conspiracy was obvious from the record. Petitioner offers conclusory allegations that the prosecution, among other conduct, knowingly used perjured testimony throughout his trial and withheld exculpatory evidence. Petitioner alleges, among other actions, that the trial judge was part of the conspiracy because he denied Petitioner's various pre-trial motions, particularly his request for subpoenas, set excessive bail, allowed Petitioner to be committed for psychiatric treatment prior to trial, and "allowed fabricated and altered transcripts of all proceedings." Petitioner contends that the defense team was also part of the conspiracy because they "had complete foreknowledge that in fact, [Petitioner] was completely innocent of the crimes," but failed to protect Petitioner's interests.

Turning first to the issue of recusal, it is well settled that "[t]he right to a fair trial before an impartial tribunal is a fundamental constitutional right." *State v. Austin*, 87 S.W.3d 447, 470 (Tenn. 2002). Whether recusal is necessary, based upon the alleged bias or prejudice of the trial judge, rests within the discretion of the trial court. *Caruthers v. State*, 814 S.W.2d 64, 67 (Tenn. Crim. App. 1991). A judge should grant a motion for recusal whenever his or her "impartiality might reasonably be questioned." Code of Judicial Conduct, Canon 3(E)(1); see *State v. Jimmy D. Dillingham*, No. 03C01-9110-CR-00319, 1993 WL 22155 (Tenn. Crim. App., at Knoxville, Feb. 3, 1993), *perm. to appeal denied* (Tenn. July 6, 1993). This court will not interfere with the trial court's discretion unless clear abuse appears on the face of the record. *Caruthers*, 814 S.W.2d at 67.

There is nothing in the record to suggest that the trial judge in the instant case was not impartial or otherwise biased against Petitioner. Petitioner is not entitled to relief on this issue.

As for Petitioner's conspiracy theory, the record contains no conclusive evidence that any conspiracy existed. The primary "proof" is the fact that Petitioner was convicted of murdering someone who, Petitioner insists, is still alive. We have previously concluded that "[m]ere allegations of conspiracy are insufficient for this Court to find that such a criminal enterprise existed." *State v. Keller*, 813 S.W.2d 146, 150 (Tenn. Crim. App. 1991). The post-conviction court found that "there was nothing here today which would suggest that there was any conspiracy to allow perjured testimony into the trial of this case; and there is no proof that the Court was involved in

knowing this, or conspired with that group.” The evidence does not preponderate against the post-conviction court’s finding that Petitioner had failed to present any evidence of a conspiracy. Petitioner is not entitled to relief on this issue.

VI. Ineffective Assistance of Trial Counsel

A. Failure to Investigate

Petitioner contends that trial counsel provided ineffective assistance because “absolutely no evidence or witnesses were ever pursued or presented on behalf” of Petitioner. Trial counsel testified that he conducted a thorough investigation of Petitioner’s case which included following up on all of Petitioner’s suggestions. Trial counsel attempted to ascertain if the victim was still alive and to locate Mr. Green but was unsuccessful in either endeavor. Trial counsel reviewed all of the medical reports pertaining to the victim’s treatment and death, and he met with Dr. Harlan and discussed the discrepancies in his autopsy report. Based on our review of the record, we conclude that trial counsel performance in this regard was not deficient.

B. Failure to Secure Home Phone Records

Petitioner contends that his son, Joshua Manning, had an accomplice whom he called before the shooting, and the phone call would have been reflected in the phone records of his home telephone number. Trial counsel testified that he “went to great lengths” to attempt to subpoena the telephone records and was successful at obtaining those phone records that had not been destroyed in the normal course of business. Petitioner has failed to carry his burden in showing that his trial counsel was deficient in this regard.

C. Failure to Introduce Results of Truth Serum Test

Trial Counsel testified that Petitioner insisted against counsel’s advice that he participate in a truth serum test prior to trial. Petitioner asserts that:

while under the influence and control of the drug, sodium amytal, [Petitioner] clearly stated, without reservation that: (“He did not obtain a gun on the night in question”); (“That he did not fire a gun on the night in question”); and that: (“He did not injure or kill anyone on the night in question.”)

Trial counsel testified, however, that Petitioner only spoke “gibberish” while under the influence of the administered drug. The post-conviction court accredited trial counsel’s testimony and found that Petitioner offered no clear and convincing evidence to contradict trial counsel’s testimony other than his own bare allegations. Petitioner is not entitled to relief on this issue.

D. Failure to Verify that Petitioner was Drugged

Petitioner argues that he was drugged by his family prior to the shooting. Against counsel's advice, the alcohol in the bottle from which he had been drinking prior to the shooting was submitted for testing. The test did not reveal the presence of any drugs in the alcohol. Petitioner contends that the investigating officers threw the alcohol remaining in his glass down the sink, and if the alcohol had been tested, the presence of drugs would have been detected. Even assuming *arguendo* that this was happened, trial counsel cannot be faulted for not submitting something for testing which no longer existed. Petitioner is not entitled to relief on this issue.

E. Failure to Request the Exhumation of the Victim's Body

Petitioner contends that he repeatedly asked his trial counsel to file a motion requesting that the victim's body be exhumed so Petitioner could prove that there was either no body in the casket, or that the body in the casket was not the victim's. Petitioner asserts that trial counsel's assistance was ineffective for failing to do so. Petitioner filed a motion to exhume the victim's body during the pendency of the post-conviction proceeding. In arguing against the grant of the motion filed post-conviction the State pointed out:

[b]ack in 1999, this issue was raised with this Court by this defendant, and the Court denied exhuming the body at that time. It went on to trial two years later, there were witnesses from the family that, of course, said that they buried their mother and identified the body and had a funeral.

The post-conviction court denied Petitioner's motion. The exhumation of the body of a victim at the request of an accused is a matter within the discretion of the trial judge. *Dennis v. State*, 198 Tenn. 325, 279 S.W.2d 512 (Tenn. 1955). Petitioner has failed to show that trial counsel's assistance in this regard was deficient.

F. Ineffective Cross-Examination

Petitioner argues that his trial counsel failed to effectively cross-examine the State's witnesses. Trial counsel testified at the evidentiary hearing that he thoroughly cross-examined the State's witnesses, including Dr. Harlan and Joshua Manning. Trial counsel said that he "pushed" Joshua as far as he could but made a tactical decision to end the cross-examination when Joshua's responses grew increasingly emotional. Trial counsel stated that at the conclusion of each witness's cross-examination, he gave Petitioner the opportunity to suggest any further questions before the witness was excused. The evidence does not preponderate against the post-conviction court's finding that Petitioner had presented nothing to suggest that trial counsel was ineffective during cross-examination. Petitioner is not entitled to relief on this issue.

G. Missing or Concealed Record

Petitioner contends generally that the "hospital, paramedic, police, pathologist, autopsy, flight crew, mental exams, [and] motions, were concealed, altered, fabricated, missing, incomplete, or not

presented to the jury.” Petitioner does not suggest what specific records he feels were omitted from evidence, and makes only conclusory allegations as to the inaccuracy of the records that were presented. The evidence does not preponderate against the post-conviction court’s finding that Petitioner failed to carry his burden of proof on this issue.

Petitioner also alleges that his trial counsel was ineffective for stipulating to the introduction of the victim’s medical records from Erlanger Hospital. The post-conviction court stated that:

the Court allowed the entire medical record to come in to be examined and cross-examined and testified to by you or anyone else, and [trial] counsel here says that you wanted it in, and it came in. And [trial] counsel followed your wishes and defended in your – the way you wanted it, and he cannot be faulted for that.

Based on our review, we conclude that the evidence does not preponderate against the post-conviction court’s finding that trial counsel’s assistance was not deficient in this regard. Petitioner is not entitled to relief on this issue.

H. Failure to Present a Defense

Petitioner argues that the assistance of his trial counsel was ineffective because “no defense of any kind was presented for the [Petitioner].” Trial counsel testified that he advised Petitioner that:

[they] should proceed on possibly that it was an accident, that [Petitioner was] under the influence of alcohol and basically drunk, and that the trigger was a hair trigger, and that it was an accident at best, possibly argue reckless homicide. You refused to let me argue any type of diminished capacity. In fact, one of the reasons I met with you every day prior to the trial was, you kept telling me that you would let us know what the defense is going to be when you took the stand, and that certain things would happen, materialize during the trial. You kept me in the dark about what your defense was going to be, so I prepared like three different strategies, three different opening statements, and you told me you’d let me know how to proceed, and it was basically very difficult, but we – you refused to accept any of our theories about how to proceed in the trial.

Petitioner acknowledged at the evidentiary hearing that he refused to let trial counsel assert a diminished capacity defense and reiterated that he did not kill anyone that night. The post-conviction court stated:

[t]he thrust here is that the crime never happened, that the woman was not killed, she’s still alive, and all the proof is to the contrary; and . . . a defense lawyer would have been hard pressed to have argued to the jury with any degree of credibility that this never happened, it never happened, and under the circumstances [trial counsel] did the best he could, and there’s nothing here to show contrary to that.

The evidence does not preponderate against the post-conviction court's finding that trial counsel's assistance was not deficient in this regard. Petitioner is not entitled to relief on this issue.

VII. Ineffective Assistance of Appellate Counsel

Petitioner argues that assistance of his appellate counsel was deficient because he presented only six grounds for relief on appeal when there were "twenty-eight (28) actual and factual, constitutional violations of [Petitioner's] rights."

Appellate counsel testified that he appealed those issues which were supported by the record and legal argument, including Petitioner's right to present a defense through compulsory process. Appellate counsel acknowledged that he did not appeal Petitioner's conspiracy issue because no evidence was presented at trial to sustain this contention.

In determining whether appellate counsel was ineffective, the same *Strickland* standards discussed above are applied and the "[p]etitioner must show that counsel's performance was deficient and that petitioner was prejudiced by this deficiency." *Porterfield v. State*, 897 S.W.2d 672, 678 (Tenn.1995) (citing *Cooper v. State*, 849 S.W.2d 744, 746-47 (Tenn. 1993)).

As our supreme court has directed:

[a]ppellate counsel are not constitutionally required to raise every conceivable issue on appeal. *King v. State*, 989 S.W.2d 319, 334 (Tenn. 1999); *Campbell v. State*, 904 S.W.2d 594, 596-97 (Tenn. 1995). Indeed, "experienced advocates have long 'emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most a few key issues.'" *Cooper v. State*, 849 S.W.2d 744, 747 (Tenn. 1993) (quoting *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)); see also *Smith v. Robbins*, 528 U.S. 259, 288, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). The determination of which issues to raise on appeal is generally within appellate counsel's sound discretion. *Jones*, 463 U.S. at 751, 103 S.Ct. 3308; *King*, 989 S.W.2d at 334; *Cooper*, 849 S.W.2d at 747. Therefore, appellate counsel's professional judgment with regard to which issues will best serve the appellant on appeal should be given considerable deference. See *Campbell*, 904 S.W.2d at 597; see also *Strickland*, 466 U.S. at 689, 104 S. Ct. 2052. We should not second-guess such decisions, and every effort must be made to eliminate the distorting effects of hindsight. See *Campbell*, 904 S.W.2d at 597; see also *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). Deference to counsel's tactical choices, however, applies only if such choices are within the range of competence required of attorneys in criminal cases. *Campbell*, 904 S.W.2d at 597.

Carpenter v. State, 126 S.W.3d 879, 887 (Tenn. 2004).

The post-conviction court found that:

[appellate counsel] testified about, he appealed grounds that were supported by the facts and the law the best he could. I haven't seen anything here today that suggests there were other grounds that should have been argued. Conclusion on your part by that, but nothing here to today to suggest what those 28 grounds were.

The evidence does not preponderate against the post-conviction court's finding that Plaintiff has failed to establish by clear and convincing evidence that his appellate counsel's assistance was deficient. Petitioner is not entitled to relief on this issue.

VIII. Denial of Petitioner's Request for Permission to Proceed *Pro Se* on Appeal

Petitioner argues that this Court erred in denying his motion for permission to proceed *pro se* on appeal. As the post-conviction court found, this issue does not present a ground for which post-conviction relief may be afforded. *See* T.C.A. § 40-35-103; *State v. Gillespie*, 898 S.W.2d 738, 741 (Tenn. Crim. App. 1994) (holding that there is no constitutional right to proceed *pro se* on appeal). Petitioner is not entitled to relief on this issue.

IX. Miscellaneous Arguments

We note that Petitioner mentioned a multitude of general, constitutionally based arguments arising out of his contention that he did not receive a fair trial, appeal, or post-conviction hearing, and his unwavering belief that he was convicted of a crime which never happened. We have reviewed all of the arguments raised by Petitioner in his various pleadings and briefs which are not specifically addressed in this opinion, and conclude that Petitioner is not entitled to relief on these arguments.

CONCLUSION

After a thorough review of the record, we affirm the judgment of the post-conviction court.

THOMAS T. WOODALL, JUDGE